



CITY OF MEDINA

501 Evergreen Point Road, Medina WA 98039

425.233.6400 (phone) 425.454.8490 (fax) www.medina-wa.gov

July 12, 2011

Colin W. Radford
3663 Fairweather Lane
Medina, WA 98039

Re: Response to Medina Shoreline Management Plan

Dear Mr. Radford,

Thank you for taking the time to comment on the Medina Shoreline Master Program (SMP) update. This is my promised follow-up regarding your July 5, 2011, letter. The purpose of this letter is to provide some context on the efforts being made to update the shoreline regulations. Hopefully this will provide an understanding of the framework we have in finding solutions to the concerns expressed in your letter.

WHY ARE WE UPDATING THE SMP?

State law (RCW 90.58.080) requires us to amend the shoreline master program to meet new state guidelines. In 1995, the state legislature directed Ecology to update the existing guidelines because they had not been revised since 1972 and it was felt they were no longer sufficient. Ecology's first attempt at updating the guidelines was challenged and resulted in a year-long mediation process. The outcome was an agreement between environmental, business and property-rights groups that served as the framework for the guidelines we must now follow.

WHAT IS THE CITY'S ROLE IN UPDATING THE SMP?

RCW 90.58.050 states that SMPs are cooperative efforts where local government has the primary responsibility for planning and administering the program. Ecology serves in a supportive role, but must also approve the SMP for it to become effective. If the City fails to act, Ecology has authority to develop the SMP for the local government. Essentially, the SMP is a state document, but it is locally created.

WHAT IS THE ROLE OF THE STATE SHORELINE MASTER PROGRAM GUIDELINES?

The guidelines provide the guiding parameters, standards and review criteria that we must demonstrate compliance with. In showing compliance, the guidelines give us substantial discretion in order to incorporate local circumstances. There are few "fixed" standards that we must follow, which gives the City considerable latitude on ways to show compliance.

The guidelines layout the basics we must do including: (1) use scientific and technical information; (2) adaption of policies and regulations to address trends and new information; (3) protect ecological functions of the shoreline; (4) establish preferred uses; (5) environmental

impact mitigation that assures no net loss of ecological functions; and (6) shoreline restoration planning that achieves over time improvements to shoreline ecological functions (this does not apply to individual property owners). These basic concepts are outlined in WAC 173-26-201(2).

Significant to preparing SMP regulations is the standard of “no net loss” of shoreline ecological function, which requires us to adopt a SMP that will maintain or improve ecological functions at their present levels while accounting for the allowance of future development. In short, over time, we must demonstrate that the introduction of new development/ redevelopment will at a minimum result in a “zero-sum” degradation of existing shoreline conditions. It’s important to recognize that “no net loss” is not a fixed number, but rather it’s a program with a stated outcome goal. As a program, there is discretion in formulating it to fit local circumstances as long as we can demonstrate the program supports the stated outcome.

In following these concepts in preparation of the SMP, the key is finding a balance of maintaining the high-quality residential setting and character of the community with protection of ecological functions along the shoreline.

HOW IS SCIENCE AND TECHNICAL INFORMATION USED?

One of our initial tasks was to collect existing shoreline data from a variety of sources, including scientific literature review. This data was collected, analyzed and portrayed on maps, tables and illustrations in a way that characterizes the shorelines’ ecological conditions. This data is summarized in the shoreline analysis report. Additionally, subsequent GIS mapping, county records, antidotal evidence from residents and previous history has been used to supplement this report.

The use of science and technical information tends to be an area of confusion. We are required to assemble the most current, accurate and complete scientific and technical information. Like most science, it is not uncommon for opinions to vary. We know that none of the science is a perfect fit to Lake Washington, but that doesn’t mean the current science can be dismissed. Ultimately, the City must consider all of the information that is made available to us, including opposing views and opinions, and the information must be judged for its merits and limitations and used to decide what standards best achieve the state guidelines given our local circumstances.

It’s also important to understand that the SMP process is not solely driven by science. Using the science and technical data to make decisions ranks high, but this is not the only element we must consider. This is why the SMP is a planning process – so that we can consider other factors as well. To satisfy Ecology, the science and technical information must be scientifically valid and its use and application must be reasonable.

WHAT ABOUT NONCONFORMITY?

It’s important to understand that updating the SMP does not apply retroactively to existing development, whether it’s a home, dock or bulkhead. New regulations apply only to new development (including expansions, repairs and replacement) and uses. The City of Medina has a unique and extensive history dealing with nonconformity that predates the SMP. Approximately 46.1 percent of the lots inside of the City do not meet minimum lot size requirements and are nonconforming. Additionally, historical records show that many of the

City's regulations have become progressively more restrictive over the years. Maximum height standards went from 30 feet above finished grade to 25 to 30 feet above finished/ original grade. Maximum dock length went from 150 feet to 100 feet in 1993. Shoreline setbacks went from 30 feet to the present scheme of 30 feet, 50 feet, and stringline (70 to 120 feet) in 1989. Most of these changes have been made with the purpose of preserving the current character of the community. However, the code changes have created the condition where a property not having any nonconformity is the exception rather than the rule. (Example: your 110-foot share dock is presently nonconforming.)

It is worth noting that the City Council recently adopted new rules governing nonconformity that make it considerably easier for property owners to maintain, alter or remodel an existing nonconforming residence. Additionally, protection was added from the loss of nonconforming rights due to fire or natural disaster. This means only a purposeful act to significantly destroy a building or significantly alter a structure will cause a property owner to lose a nonconforming right. We will evaluate the present rules to see what additional changes are desired if any.

WHO IS RESPONSIBLE FOR CONTROLLING WATER QUALITY AND POLLUTION?

Everyone is required to do their share when it comes to controlling pollution from stormwater runoff. Stormwater pollution and water quality is governed under the National Pollutant Discharge Elimination System (NPDES), which is an element of the Federal Clean Water Act. The City complies with NPDES, which included the adoption of stormwater regulations that over the long term should improve water quality in Lake Washington. It's worth noting that the SR 520 project also must comply with NPDES and will include new stormwater facilities as part of the highway construction. However, the presence of stormwater regulations and improvements to SR 520 does not lessen the responsibility waterfront property owners have in addressing impacts generated by their activities. WAC 173-26-201(2)(e) specifically requires individuals to mitigate for impacts caused by their activities so mitigation measures must be included in the SMP.

The broad-based community impacts noted in your letter, however, are not ignored. The state guidelines recognized that individual property owners cannot and should not alone carry the burden of meeting no net loss when viewed from a community-wide basis. The community-wide meeting of no net loss is addressed through a Shoreline Restoration Plan. The restoration plan, which has not been fully completed, will not apply to private development. What the plan does is identify opportunities for improving shoreline ecological functions on a community basis. Because there are limited opportunities inside of the City for community restoration projects, much of the plan incorporates restoration efforts through watershed planning, which is regionally based. Implementing NPDES is one of those regional restoration efforts identified.

ARE WE REQUIRED TO PLANT VEGETATION?

The short answer is no. No property owner will be required to install vegetation unless it is the appropriate method of mitigating an impact resulting from a development or use proposed by the property owner. Similar to the question about nonconformity, the requirement for vegetation plantings does not apply retroactive.

ARE WE REQUIRED TO HAVE BUFFERS?

Buffers differ from setbacks in that intrusions into buffers are generally not allowed. The SMP update does not propose to require any new buffers. The exception will be instances where a vegetative buffer may be required as part of mitigating an impact. The other exception will be per critical areas regulations, but these are not new.

HOW DOES THE SMP PLANNING PROCESS WORK?

The City advertised and held an open house in April 2010 to start the SMP planning process. A citizen advisory committee was formed, which was first advertised at the open house and subsequently advertised again in May. Three people volunteered for the committee and began meeting in January 2011. Those meetings have been advertised and open to the public.

The committee worked with the staff to prepare discussion draft documents of first the goals and policies and then the regulations. These are the documents we have advertised and sought public comments on.

Currently, the Planning Commission is discussing the regulatory pieces and continues to seek additional public comments. They are using the discussion document and public input to formulate a final draft SMP. Once the Planning Commission is comfortable with the pieces, a final SMP will be assembled and environmental review will be performed, and a public hearing will be scheduled.

After the Planning Commission makes a recommendation to the City Council, following the public hearing, the Council will discuss the SMP and once they take action, it will be forwarded to Ecology for final review.

OTHER THINGS TO NOTE:

City staff has been coordinating with staff from Hunts Point and Yarrow Point. However, in the end each community needs to have a very localized SMP based on its unique circumstances. Also, I am also attaching a document that Ecology sent to the City of Sammamish during their SMP update process. Ecology conditionally approved Sammamish's SMP, but is requiring 77 changes to the SMP approved by their City Council. The intent of my giving you this letter is to give an idea of some of the things Ecology pays attention too.

I hope this letter is helpful. Again, I would like to thank you for your comments. Please be aware that this is not a complete comprehensive review of the particulars of preparing a SMP. However, I hope I have addressed the concerns expressed in your letter. If you have any questions, please let me know.

Sincerely,



Robert J. Grumbach, AICP
Director of Development Services

Cc: City Council, Planning Commission, Shoreline Advisory Committee, City Manager

To: Lake Washington/Sammamish Local Government; staff, planning commissions, citizen advisory committee and elected officials working on updating Shoreline Master Programs

From: Washington State Department of Ecology – Shorelands & Environmental Assistance Program

Subject: On-going guidance on Shoreline Master Program updates

Ecology is aware of recent letters and emails raising questions related to updates of local Shoreline Master Programs (SMP) within Lake Washington and Lake Sammamish. In an effort to offset any miscommunication and ensure broad understanding of the SMP Guidelines (WAC 173-26), Ecology has attempted to synthesize many of the comments voiced and provide some guidance to these questions for your consideration.

SMP QUESTIONS SENT TO LOCAL GOVERNMENTS:

What is the definition of “No Net Loss of Ecological Functions”? Is “no net loss” applied state-wide, by jurisdiction or on a project-by-project basis?

What is No Net Loss of Ecological Functions? Simply stated, the no net loss standard is designed to halt the introduction of new impacts to shoreline ecological functions resulting from planned for and permitted new development. This means that through implementation of the updated SMP, the existing condition of shoreline ecological functions should remain the same or be improved over time. The Shoreline Master Program Guidelines (Guidelines) set forth the obligation to assure that no net loss of ecological functions will be achieved within the SMP’s planning horizon by implementing updated SMP policies and regulations. No net loss of ecological function is a jurisdiction specific determination that is based on anticipated future uses and associated ecological risks from allowed uses within shoreline areas. SMA policy and the Guidelines recognize the need to balance both *use* and *protection* of shoreline resources. Thus, SMPs must provide for preferred shoreline uses set forth in the SMA (RCW 90.58.020). These include water-dependent uses like port development, public access facilities, and owner occupied single-family residences. Impacts resulting from these preferred shoreline uses, when they cannot be avoided, must be reduced by other SMP environment designations and regulations which follow the required mitigation sequence. Achieving no net loss of ecological function relies on consistent application of mitigation sequencing. Mitigation sequencing sets a priority to first avoid, then minimize, rectify, reduce or compensate for impacts

The no net loss analysis is intended to inform the SMP planning process by describing both the presence and potential risks to existing shoreline ecological functions. The analysis should evaluate the intensity of future uses that are appropriate for segments of shorelines to ensure no overall or net loss of ecological functions. A no net loss of ecological functions determination will need to be justified by local governments through a Cumulative Impact Analysis, which essentially anticipates build-out of shoreline areas pursuant to the intensity of development allowed through the updated SMP. This determination must conclude that build-out of the local shoreline will not further threaten existing shoreline ecological functions. In sum, the no net loss

standard applies to each local jurisdiction as it updates its SMP. Consistent with the no net loss standard, the required mitigation sequence is also applied as the SMP is implemented over time and individual shoreline projects are reviewed and approved by local government. Mitigation sequencing and/or alternative project specific monitoring for no net loss, should provide clear linkage to jurisdiction-wide not net loss goals.

The Department of Ecology (DOE) is overstepping its authority. DOE has an agenda. DOE is over regulating Piers/Docks and Bulkheads without conclusive evidence of their affect on shoreline resources (i.e. overlapping regulations unwarranted changes)

By way of example, recent studies focusing on the affects of shoreline alterations to salmon migration in the littoral environment of lakes (Tabor et al, 2002)¹ (Kahler et al, 2000)² have raised concern pertaining to both the physical barrier of a dock/pier as well as affects to aquatic habitat for both migrating and rearing salmon species. In addition to environmental concerns, increased pier/dock density along shorelines can also negatively affect "normal public use" of the shoreline for recreation and navigation uses upon waters of the state. The state legislature, in RCW 90.58.020 policy, lists Environmental Protection and Public Access as fundamental policy goals/preferred uses within the Shoreline Management Act. In order to provide environmental protection to shorelines, local jurisdictions are required to document existing ecological functions within a shoreline Inventory/Characterization (WAC 173-26-201). The Guidelines (WAC 173-26, Part III) require local governments to address cumulative impacts by considering commonly occurring shoreline development and foreseeable impacts caused or avoided by proposed SMP policies and regulations. Ultimately, SMP policy and regulations must ensure no net loss of ecological functions with reference to the baseline shoreline conditions described within the locally prepared Inventory/Characterization.

In preparing shoreline regulations, local governments are also required to implement a precautionary principle. At WAC 173-26-201(3)(g) the guidelines state "*As a general rule, the less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources*". If there is a question about the extent or condition of an existing ecological resource, then the master program provisions shall be sufficient to reasonably assure that the resource is protected in a manner consistent with the policies of these guidelines.

Local governments are required to regulate Piers/Docks through the following sections of the SMP Guidelines (WAC 173-27-211):

¹ Tabor, R.A., and R.M Piaskowski, 2002. Nearshore habitat use by juvenile Chinook salmon to lentic systems of the Lake Washington Basin. Annual Report, 2001. U.S. Fish and Wildlife Service, Lacey, WA.

² Kahler, T.,M. Grassley and David Beauchamp. 2000. A summary of the effects of bulkheads, pier and other artificial structures and Shorezone development on ESA-listed salmonids in lakes. City of Bellevue

- WAC 173-26-211(5)(c)(ii)(D) states: *"All developments and uses on navigable waters or their beds should be located and designed to minimize interference with surface navigation ... and to allow for the safe, unobstructed passage of fish and wildlife, particularly those species dependent on migration."*
- WAC 173-26-231(b) *"Piers and docks, including those accessory to single-family residences, shall be designed and constructed to avoid or, if that is not possible, to minimize and mitigate the impacts to ecological functions..."*
- WAC 173-26-221 (2)(c)(iii) and (iv). *"Master programs should require that structures be made of materials that have been approved by applicable state agencies."*

Flexibility versus specific standards for Piers/Docks? Redevelopment standards versus new Piers/Docks standards?

In order to meet the no net loss requirement, jurisdictions updating their SMP's must consider the cumulative impacts of future allowed shoreline uses. Specific to Piers/Docks, jurisdictions will need to refer to specific development standards as a basis for evaluating the build-out potential allowed through future implementation of the updated SMP. This analysis of cumulative impacts must consider the potential risks to shoreline ecological functions if the shoreline were to be fully developed to the maximum intensity allowed through the updated SMP. Therefore, specific to new Piers/Docks, dimensional standards must be proposed as part of the updated SMP. Without specific standards, there would be no certainty in local projections of future (planned) shoreline uses and their impacts and hence no justification that the no net loss standard will be achieved.

The Army Corps of Engineers Regional General Permit (RGP) #3 consist of regionally specific, science based Pier/Dock development standards. These standards reflect completed consultation for Endangered Species Act (ESA) Section 7 and essential fish habitat (EFH) review from federal resource agencies. Pursuant to the SMP Guidelines, updated SMP's are required to be based on objective use of relevant scientific information, for which the RGP standards provide an opportunity for local jurisdictions to incorporate existing minimizing Pier/Dock standards. Local jurisdictions have the option to come up with different standards, but they will need to supply sufficient science based analysis illustrating potential risks to shoreline ecologic functions. Regardless, if jurisdictions decide to utilize the RGP standards or create their own Pier/Dock standards consideration of cumulative impacts as well as a determination of no net loss (risk) of shoreline ecological functions must be concluded.

Existing Pier/Dock redevelopment strategies will need to be jurisdiction specific. These standards should be based on the jurisdictions SMP Inventory/Characterization, with appropriate sideboards identified to ensure that expanded or reconstructed Piers/Docks will not result in net loss of ecological functions. For example, a shoreline with a high density of existing Piers/Docks, may be able to define redevelopment standards that allow some flexibility in the size or orientation of the redeveloped overwater footprint or structures, while also incorporating some degree of restoration. This management strategy must acknowledge existing shoreline resources and maintain or restore shoreline ecological functions through

redevelopment. Restoration of impaired ecological functions should be included in the evaluation of no net loss to help offset impacts introduced from new planned shoreline development allowed in the updated SMP. Alternatively, with less developed shorelines, Ecology suggests that local governments clearly distinguish between new and re-development standards to ensure adequate protection of existing ecological functions.

Streamlined permitting process at what cost to property rights?

It is anticipated that any identified streamlined process would not be the only option available to shoreline property owners. For certain uses, local governments do have an opportunity through updating of their SMP to pre-analyze impacts of certain minimal impact activities and provide a streamlined review process for those limited uses. In general, the scope of projects fitting within a streamlined permitting process must be more specific and potentially restrictive to ensure certainty and broad consistency with SMP goals and policies. For example, Pier/Dock proposals consistent with federally established guidelines could be streamlined through a local shoreline permit process for some shoreline areas where shoreline ecological functions can be shown to not be negatively impacted.

Restrictive Pier/Dock standards are thwarting of shoreline property owner's property rights.

Under Washington State law a private dock is not a shoreline property right associated with ownership of shorelines of the state. Construction of a dock or pier is a privilege that may be allowed under certain circumstances when consistent with Shoreline Management Act policy (RCW 90.58.020), the local government Shoreline Master Program and the Public Trust Doctrine.

The Public Trust Doctrine is a legal principle derived from English Common Law. The essence of the doctrine is that the waters of the state are a public resource owned by and available to all citizens equally for the purposes of navigation, conducting commerce, fishing, recreation and similar uses and that this trust is not invalidated by private ownership of the underlying land. The doctrine limits public and private use of tidelands and other shorelands to protect the public's right to use the waters of the state. (See State Supreme Court case *Caminiti v. Boyle*, 107 Wn. 2d 662, 732 P.2d 1989). The Public Trust Doctrine does not allow the public to trespass over privately owned uplands to access the tidelands. It does, however, protect public use of navigable water bodies below the ordinary high water mark. Protection of the trust is a duty of the State, and the Shoreline Management Act is one of the primary means by which that duty is carried out. The doctrine requires a careful evaluation of the public interest served by any action proposed. This requirement is fulfilled, in major part, by the planning and permitting requirements of the Shoreline Management Act and locally approved SMPs.

In any case, local governments do have the authority to regulate the size and require mitigation for potential impacts associated with docks to protect the public interest.

QUESTIONS DIRECTED TO ECOLOGY:

What baseline is used for each individual property based on the SMP Guideline no net loss of ecological function requirement?

The baseline for SMP updates is derived from the individual shoreline Inventory and Characterization prepared for each jurisdiction during the initial stages of their shoreline program update. This analysis is intended to inform the SMP planning process through description of both the presence and potential risks to existing shoreline ecological functions as described within WAC 173-26-201(3)(c) and (d). The Inventory/Characterization is not necessarily intended to evaluate individual properties. Rather, the analysis should describe what intensity of future shoreline uses and activities should be planned and anticipated for each segment of shoreline to ensure that the end result is no overall or net loss of ecological functions. In other words, it is understood (and should be evaluated) that some projects will have minimal negative impacts and some projects will improve ecologic conditions, as long as a jurisdiction can illustrate overall maintenance or improvement to ecological conditions, then they are meeting the no net loss requirement. The no net loss determination will need to be justified through a Cumulative Impacts Analysis, which essentially anticipates build-out of shoreline areas pursuant to the intensity of development allowed through the updated SMP. With this information, the impacts to existing shoreline ecological functions resulting from future development can be anticipated and where appropriate avoided. It is important to understand that this analysis will vary by jurisdiction and is fundamentally based upon the characteristics of each individual jurisdiction's shoreline.

Specific to implementation of an updated SMP, individual project review should consider no net loss as a governing principal (WAC 173-26-186). So, in summary, the baseline for each individual property is the ecological conditions that existed at the time a local SMP is comprehensively updated per SMP Guidelines requirements.

Will new piers or bulkheads replacing existing structures be evaluated against existing site conditions?

Yes, existing site conditions are one consideration, but also the specific planning policies and regulations contained in the SMP that apply to new piers and bulkhead replacements and the particular shoreline site will need to be considered as well. SMP updates are two-dimensional, requiring jurisdiction-wide planning for future uses as well as implementation over time of the SMP on an individual project-by-project basis. From a jurisdiction-wide planning perspective, the shoreline Inventory and Characterization documents shoreline modifications that may or may not impair existing shoreline ecological functions. Regardless of the degree of existing modifications, the bottom line is that updated SMP's need to adequately protect existing shoreline ecological functions. For example, within heavily developed shorelines, redevelopment strategies that account for improvements to existing site conditions might be an appropriate approach. Whereas, within unaltered (natural) shorelines, emphasis should be placed on protection measures for which existing structures should be phased out overtime as existing non-conforming uses.

Example Question: How is DOE suggesting local governments view a scenario where an applicant is pulling a full length bulkhead and replacing with transitional bulkheads at either end and a cove beach in the middle?

Ecology would be in support of partial restoration of shorelines as described within the scenario above, because it represents an improvement in existing conditions when compared to the existing full length bulkhead. For jurisdictions with highly developed shorelines, Ecology would suggest that local governments clearly describe redevelopment perimeters to encourage partial shoreline restoration.

What is DOE doing to encourage local governments to have a process acknowledging individual improvements associated with shoreline redevelopment?

As previously stated, redevelopment strategies should be jurisdiction specific with appropriate sideboards to ensure no net loss. Also, as part of the comprehensive SMP update, jurisdictions are creating individually customized shoreline restoration plans, where non-regulatory shoreline improvements would be prioritized and encouraged for each stretch of shoreline. In implementing a local restoration plan, all jurisdictions should be encouraged to maintain a list of *"individual improvements associated with shoreline redevelopment"*, so that in the future progress can be identified and evaluated.

Does DOE have a responsibility to protect local governments from vulnerability to thwarting private property rights of shoreline property owners?

Both local governments and the department have the responsibility to ensure private property rights in shoreline areas are not thwarted. There are multiple references both in the SMA itself (starting at RCW 90.58.020) and again in the SMP Guidelines (starting at WAC 173-26-176(3)(h)) ensuring private property rights are protected.

Local governments are directed to consider private property rights in the preparation of all local SMPs as is Ecology and the Attorney General's Office (AGO) when approving the SMPs. Specifically, the AGO is directed by state law to advise state agencies and local governments in an orderly, consistent process to evaluate proposed regulatory or administrative actions to assure that these actions do not result in unconstitutional takings of private property. The AGO does in fact review SMP submittals to ensure private property rights are protected before the SMPs are approved by Ecology. Following is a link to this guidance posted on our shorelines management web site:

[http://www.atg.wa.gov/uploadedFiles/Home/About the Office/Takings/2006%20AGO%20Takings%20Guidance\(1\).pdf](http://www.atg.wa.gov/uploadedFiles/Home/About%20the%20Office/Takings/2006%20AGO%20Takings%20Guidance(1).pdf)

How is DOE addressing the apparent conflict with biological consulting firms assisting local governments in their SMP update in fairly evaluating and applying SMP standards in a reasonable and practical manner?

Biological consulting firms when involved in SMP updates are only one source of available information. Local governments are required to use all available technical and scientific information in the development of their SMP. This includes contacting all *“relevant state agencies, universities, affected Indian tribes, port districts and private parties for available information.... The requirement to use scientific and technical information in these guidelines does not limit a local jurisdiction's authority to solicit and incorporate information, experience, and anecdotal evidence provided by interested parties as part of the master program amendment process. Such information should be solicited through the public participation process...”* (WAC 173-26-201(2)(a)).

It is not clear how any conflict exists if there is no limitation on sources of available information. Ultimately, local government elected officials must consider all of the information put before them, including opposing views and opinions, judge their credibility and decide what standards best achieve SMP guidelines requirements, given local circumstances.